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SIPDIS

SIPDIS

STATE FOR EB/IPE - JENNIFER BOGER and EAP/ANP - DAN RICCI
STATE PLEASE PASS TO USTR FOR JENNIFER CHOE GROVES
STATE PLEASE PASS TO USPTO
COMMERCE FOR CASSIE PETERS ITA/MAC/OIPR

E.O. 12985: N/A

TAGS: KIPR ETRD ECON PREL NZ

SUBJECT: GOVERNMENT OF NEW ZEALAND'S PUBLIC SUBMISSION FOR 2007
SPECIAL 301

REF: STATE 07944

¶1. On January 9, the United States Trade Representative submitted a Federal Register notice inviting public submission on the practices of U.S. trading partners to be reviewed under the Special 301 provisions of the 1974 Trade Act (as amended in 1988). On February 12, the Government of New Zealand asked Embassy Wellington to submit New Zealand's formal response to Washington. The text of the GNZ's submission begins at para 2. Embassy Wellington will report septel on our own views on New Zealand's IPR enforcement.

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Begin Information provided by Government of New Zealand
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¶2. The following information is provided by the New Zealand Government to the US Trade Representative (USTR) in response to USTR's call for public submissions, published in the Federal Register on 9 January 2007, ahead of the annual interagency "Special 301" review to designate countries/economies that inadequately protect or deny market access for US industries that rely on intellectual property (IP).

Digital Copyright Bill

¶3. The Digital Copyright Bill (or, more accurately, the Copyright (New Technologies and Performers' Rights) Amendment Bill) was introduced to Parliament and referred to the Commerce Select Committee for consideration in December 2006. A copy of the Bill is available at:

<http://www.parliament.nz/en-NZ/PB/Legislation/Bills/b/2/a/b2ad626160694aee9536fab3362d7d15.htm>.

¶4. The Bill, if adopted, will amend the Copyright Act 1994 (the Act) to clarify the application of existing rights and exceptions in the digital environment and to take account of international developments. The Bill also seeks to create a more technology-neutral framework for the Act.

Patents Bill

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¶5. The Patents Bill is now in the final stages of drafting and is expected to be introduced to Parliament later in 2007. An exposure draft of the Patents Bill was made public in December 2004. A copy can be accessed at:

http://www.med.govt.nz/templates/Page____1315.aspx

Parallel Importation

¶6. Parallel importing has been previously raised in the USTR National Trade Estimate Report.

"Parallel importing" allows retailers, wholesalers and other parties to obtain goods subject to IP rights directly from licensed or authorized overseas sources, rather than dealing with local suppliers, licensees or agents. In doing so, parallel importing allows for competition between sources of the same or similar goods.

¶7. Copyright is the IP right most commonly associated with parallel importation, as parallel importing generally focuses on the competitive supply of high demand consumer goods, which tend to be copyright products. Imported goods are also subject to trade mark protection where trade marks are affixed to the product or packaging. Patent protection can apply to the operation of a device (such as a CD player), and registered design protection can also be an issue in relation to visual design features added to a device.

¶8. Parallel-imported goods are sometimes confused with pirated and counterfeit goods. The association is not correct. Parallel imports are goods that are manufactured and put into circulation in another country either by, or with the consent of, the owner of the applicable IP rights. In contrast, pirated and counterfeit goods are infringing goods produced without the consent of the owner of the IP right.

¶9. New Zealand allows parallel importation in certain defined circumstances. The Copyright Act 1994 provides copyright owners

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with the exclusive right to "issue to the public", which means to put copies of copyright works into circulation. Section 9(1) (d) of the Copyright Act was inserted by the Copyright (Removal of the Prohibition on Parallel Importing) Amendment Act 1998 to allow for the parallel importing of non-infringing copies of a work into New Zealand, by providing an exception to the right to issue copies to the public .

¶10. The Trade Marks Act 2002 has also been amended (in 2003) to state that a registered trade mark is not infringed by the use of the trade mark (including in use for the purpose of advertising) in relation to goods that have been put on the market anywhere in the world under that trade mark by the owner or with his or her express or implied consent. These amendments did not change the applicability of other IP statutes, relating to patents and design rights, to parallel imported goods.

¶11. In 2003, a partial ban on parallel importation of films (including VHS, VCD and DVDs) was introduced. The Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003 reintroduced this partial ban by amending provisions of the Act, relating to infringement by importation. The ban is on parallel imports of films other than for the importer's private and domestic use, within nine months of the film first being made available to public, whether in New Zealand or elsewhere. The provision contains a five year sunset clause and will be reviewed by 2008 to see if the ban continues to be justified in light of technological developments.

¶12. The 2003 amendment also shifted the evidentiary onus of proof to the defendant in civil proceedings concerning whether the imported goods in question are infringing copies. These changes only apply to sound recordings, films and computer programs. The amendment also changed the requirement that a defendant in civil proceedings must "know or has reason to believe" to a requirement that the defendant "knows or ought reasonably to know". This more objective test makes it easier for right holders to make their case.

¶13. The 2003 amendment Act also clarified "rental rights" as they apply to computer programs, sound recordings and films. This means that copyright owners have the exclusive right to authorize the

rental of their works, including after they have been put into circulation. As a result, video stores cannot rent out parallel imported DVDs and videos etc, without permission of the copyright owner.

¶14. The World Trade Organization Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") and the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention"), to which both New Zealand and the US are parties, do not constrain the parallel importation of legitimate copyright materials.

Format shifting

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¶15. "Format shifting" is also an issue that has been identified in the US National Trade Estimates Report.

Format shifting is a copyright issue. It simply refers to the practice of copying material from one format to another, for example, from CD to cassette tape or from CD to MP3 format.

¶16. Following a review of the Copyright Act 1994 to assess its effectiveness in the digital environment, the Government approved a range of amendments to the Act. In December 2005 Cabinet approved the Copyright (New Technologies and Performers' Rights) Amendment Bill ("the Digital Copyright Bill") for introduction. The Bill was introduced in Parliament in December 2006 and forwarded to Parliament's Commerce Select Committee for consideration.

¶17. Among the amendments included in the Bill is an exception to allow the owner of a legitimate sound recording to make one copy in each format for his or her own private and domestic use. This is known as the "format shifting" exception. The exception will explicitly exclude making copies from borrowed or hired recordings, or for other people.

¶18. The absence of an exception for format shifting also makes law-breakers out of otherwise law-abiding citizens, many of whom are unaware that format shifting their own CDs is against the law. On the basis that users are unlikely to purchase the same work in more than one format, it was concluded that there was not sufficient evidence presented to suggest that copyright owners would suffer

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economic loss arising out of this exception.

¶19. If adopted, this carefully drafted format shifting exception would comply with the Berne Three-Step Test and New Zealand's TRIPS obligations concerning copyright exceptions. Specifically:

Step 1 - Confined to certain special cases: The proposed exception would be clearly and carefully defined in the Act. It would only apply to a narrow range of activity.

Step 2 - Not conflicting with a normal exploitation of the work: There is not a substitution effect at work when the owner of a sound recording format shifts that work into another format, as that consumer is unlikely to purchase the same work in multiple formats. The exception would only apply to private and domestic format shifting by a single person who owns the legitimately acquired sound recording. The proposed exception is, therefore, confined to a scope and degree that does not enter into economic competition with the ways that right holders normally extract economic value from their rights.

Step 3 - Not unreasonably prejudicing the legitimate interests of the right holder: Prejudice to these legitimate interests caused by an exception is not reasonable if it causes (or has the potential to cause) an unreasonable loss of income. As noted above, there would be no substitution of sale effect where narrow format shifting of sound recordings is permitted, and thus there is no competition with the original work.

¶20. New Zealand is aware that consumers in the US are able to format shift music that they have legally purchased under the Audio Home

Recording Act 1992 ("the AHRA"). The AHRA provides immunity against copyright infringement action, provided that the copying is performed on a digital audio copying device as defined by the AHRA. A levy of these devices is then returned to copyright owners and creators. It also seems likely that the broad "fair use" provision in section 107 of the US Copyright Act 1976 would allow consumers to format or "space" shift music they own. The United States Court of Appeals for the Ninth Circuit noted in Recording Industry Association of American v Diamond Multimedia 180 f.3d 1072 (9th Cir. 1999) that space shifting "is paradigmatic non-commercial personal use", which is consistent with copyright law.

¶21. In the absence of a broad fair use provision in New Zealand legislation, a specific exception is required to allow New Zealand consumers to engage in the same activity. The proposed New Zealand exception is narrower than that covered by "fair use" in the US, and it specifically limits copying to one copy per format, specifies that the original sound recording must be legitimate and explicitly excludes making copies from borrowed or hired recordings.

¶22. New Zealand's Ministry of Economic Development and the Associate Minister of Commerce, the Hon Judith Tizard, who has portfolio responsibility for intellectual property, have been engaged in an on-going dialogue with the New Zealand music industry. The Government was flexible on the drafting of the proposed exception and added a sunset clause and a condition that the exception would be overridden by any license provision so as to address industry concerns.

Time shifting

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¶23. Time shifting has arisen in the US Trade Estimates report. Time shifting generally refers to recording a program to watch it at a later time. The Copyright Act currently provides an exception in section 84 for time shifting of broadcasts or cable programs for private and domestic use and solely for the purpose of watching or listening at a more convenient time. The Government has decided that, in line with the policy of technological neutrality, this section should be amended to cover all communication works, except those available on demand (as a convenient time is always available on demand). This is consistent with the decision to replace broadcasts and cable program services with a technology-neutral category of communication work, which will provide copyright protection for a wider range of transmission or delivery technologies.

¶24. Time shifting exceptions are common. New Zealand considers that the revised technology neutral exception will meet the requirements of the Berne three-step test. The US music industry has expressed concern that the time shifting exception would "eliminate the ability of right holders to develop new approaches to meeting consumer demand for electronically

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delivered materials and reduce access and choice for New Zealand consumers to these materials."

¶25. Given the narrow scope of the time shifting exception, and the clear rationale for it, it will not apply any differently in the digital world than in the analogue world. Copying music from Internet stream casts, for example, to build up a home music collection will not be authorized by the exception any more than was taping music from the radio for the same purposes.

¶26. The proposed New Zealand exception explicitly relates only to watching or listening at a more convenient time. It does not allow home users to build up a collection or "library" of films or music for ongoing and repeated use. Equally, the provision that time shifting does not apply to material available "on demand" clearly delineates the scope and rationale of the exception. Where the exception does not apply, copying without the copyright owner's permission will continue to constitute infringement.

¶27. The expansion of copyright protection for activity such as "web casting", as part of the proposed technology-neutral category of

communication works, is consistent with the US position on this issue in debate at the World Intellectual Property Organization (WIPO) regarding the rights of broadcasters.

Technological protection measures

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¶128. Technological protections measures ("TPMs") include devices, mechanisms or systems designed to guard against or restrict the use of material stored in digital format. Copyright owners are increasingly using TPMs as a practical means to protect their copyright and develop new business models (such as pay-per-view). TPMs may prevent access to or use of a work and may, therefore, inhibit the exercise of "permitted acts" allowed by the Act.

¶129. The Digital Copyright Bill proposes changes to provisions in the Copyright Act concerning TPMs. Section 226 of the Act currently allows copyright owners to take action against persons who supply or manufacture devices, means or information specifically designed to circumvent "copy-protection" and intended to be used to make infringing copies of copyright works. The Bill extends this protection so that copyright owners would have the ability to take action in respect of all the copyright owner's exclusive rights, not just copying, in recognition of the increasing importance of rights of communication and the necessary incentives for the provision of online and digital services.

Copyright versus "access" control

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¶130. An issue that arises is whether copyright legislation should protect both "copy" and "access" control. The focus of the New Zealand TPM provisions will continue to be on "copy" control, and thereby link circumvention to copyright infringement. Copyright owners would not, for example, be able to take action in respect of circumvention devices, means or information where the purpose of the circumvention (and the provision of the device, means or information) is to enable a user to exercise a permitted act, or to view or execute a legitimate non-infringing copy of a work.

¶131. In other words, New Zealand will not be providing protection against infringement of TPMs that are just about access control (i.e. preventing access to copyright works) where no copyright infringement has occurred. The rationale for this is that "access" is not one of the exclusive rights provided to copyright owners in copyright legislation. The protection for TPMs that are just access controls goes beyond the traditional scope of copyright protection and would override the ability of users of copyright material to exercise legitimate and longstanding permitted acts.

"Act" versus "means" of circumvention

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¶132. As noted above, the right of action provided to copyright owners is in relation to provision of devices or means specifically designed or adapted to circumvent copy-protection, and in relation to the publication of information intended to enable or assist persons to circumvent copy-protection. The "act" of circumvention is not itself prohibited.

¶133. The rationale is that consultation in the development of digital copyright policy indicated that extension of liability to the act of circumvention itself would only be beneficial in terms of addressing

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copyright infringement where circumvention occurs on a commercial scale. Anecdotal evidence suggests that circumvention does not occur on such a scale in New Zealand. Targeting actual circumvention would not generate additional incentives for the creation of works, which is the ultimate policy goal of the Act.

¶134. In addition, a prohibition against the actual act of circumvention would potentially catch a range of innocent or unintended activity. As such, it would need to be accompanied by a range of exceptions for certain behavior (e.g. circumvention to exercise permitted acts, computer security research). This approach

inevitably ties the Act to current circumstances and will not necessarily capture all relevant behavior.

¶135. The Bill also contains new provisions to enable the actual exercise of permitted acts where TPMs have been applied. Initially the onus would be on copyright owners, upon application from users, to take voluntary steps to allow the effective exercise of permitted acts. Where owners failed to take voluntary steps the Act would allow the provision or manufacture of circumvention devices, means or information, on receipt of a declaration from a library, archive or educational establishment that circumvention is required for the purposes of exercising a permitted act.

Remedies

¶136. The Bill will introduce a criminal offence as a deterrent, in addition to civil remedies in respect of the provision of circumvention devices, means and information. Criminal offences would operate where there has been large scale commercial dealing in circumvention devices, means and information. Such offences would be punishable on conviction by a fine not exceeding NZ\$150,000 and/or imprisonment for a term of not more than five years (consistent with existing offence provisions).

¶137. The focus on copyright infringement rather than "access control" is considered to be consistent with international standards, including the WIPO Copyright Treaty ("WCT") and the WIPO Phonograms and Performers Treaty ("WPPT") that New Zealand is not a party to. Articles 11 and 18 of these treaties respectively require parties to provide adequate legal protection and effective legal remedies against the circumvention of effective TPMs that are used by copyright authors and owners in connection with the exercise of their rights under those treaties or the Berne Convention.

¶138. The WCT and WPPT do not specify whether a copy or access control approach should be taken. The New Zealand approach is consistent with that taken by a number of countries who are parties to the WIPO Internet Treaties, as noted in WIPO's survey of implementation of those agreements.

Extension of Copyright Term

¶139. Copyright term refers to the length of time that copyright owners enjoy exclusive rights. At the expiry of the copyright term a work enters the "public domain" and it can be exploited by anyone without the risk of copyright infringement. New Zealand wants to maintain the TRIPS-consistent term for copyright protection. New Zealand considers that an extension of the copyright term would provide little increase in the incentive to create, and would be likely to have a detrimental effect on creativity that builds upon existing works, and added transactional and tracing costs in identifying and locating copyright owners.

Patent term for pharmaceuticals

¶140. In New Zealand, the patent term is 20 years from the date of filing of the application, with no provision for extension. This is consistent with the minimum standards required by the TRIPS Agreement. In 2003, the New Zealand Government considered whether the patent term for pharmaceuticals should be extended in New Zealand. The views of interested parties including the pharmaceutical companies were sought. After considering all the issues, the Government decided that the patent term should not be extended. It was considered there was insufficient evidence that the benefits, mainly in the form of increased investment in New Zealand, would offset the costs in the form of increased costs of patented pharmaceuticals. Extending the patent term would delay the entry to the market of generic pharmaceuticals.

¶141. In 2002 the Patents Act 1953 was amended to introduce a "spring

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boarding" provision. This allows generic pharmaceutical

manufacturers to make use of patented pharmaceuticals for the purposes of obtaining regulatory approval. This allows generic pharmaceuticals to enter the market shortly after patent expiry. The US has a similar provision (the so-called "Bolar" exemption).

Other Patent Issues

¶42. New Zealand would want to continue to avail itself of the various exclusions and exceptions relating to patentability contained in the TRIPS Agreement. These include exceptions and flexibilities relating to public health, morality and public order, and life forms. The Patents Bill, expected to be introduced later in 2007, specifically incorporates some of these exceptions to address Maori and Treaty of Waitangi issues concerning life forms and traditional knowledge.

McCormick